FILED
MAR 1 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 566

LOUIS MITCHELL, RALPH LIPSCOMB, JACK CROWLEY, FRED PETERS, CARL PHILLIPS MAUS, BABE W. BOWMAN, KENNETH OLSON, CLAYTON CASH, ARLING MARTYN, HERBERT STOWE, JOHN PEARSON SMITH, JR., SONNY DAWSON,
Petitioners,

vs.

WHITE CONSOLIDATED, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT, WHITE CONSOLIDATED, INC.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT, WHITE CONSOLIDATED, INC., IN OPPOSITION.

MAY IT PLEASE THE COURT:

I.

OPINIONS BELOW.

The opinion below in the case at bar (Tr. 68) is published as *Mitchell, et al.* v. *White Consolidated, Inc.*, 177 F. 2d 500.

The opinion below in a companion case brought by George White, another passenger in the bus with the plaintiffs in this case, is reported in *White* v. *White Consolidated*, 7 Cir. 157 F. 2d 758.

II.

STATEMENT OF THE CASE.

The petitioners are questioning the decision of the Court of Appeals in affirming the ruling of the District Court dismissing petitioners' case for failure to state a claim.

In their amended complaint petitioners undertook in much detail to charge the respondent with negligence resulting in injuries to the petitioners. The matter for decision by the District Court and the Court of Appeals, was whether the allegations contained in the amended complaint were sufficient to state a claim against the defendant. Both courts held the amended complaint failed to state a claim upon which any relief could be granted the petitioners.

In their amended complaint petitioners alleged that the defendant by contract with the Indiana State Highway Department, was resurfacing Broadway, a north and south State highway in the City of Gary. There were two street car tracks in the center of Broadway belonging to Gary Railway Company situated upon a concrete strip under franchise by the Railway Company. South of 23rd Avenue the trolley wires were supported by poles erected between the rails of the two sets of tracks. (Tr. 7.) The respondent at the time of the accident was resurfacing the west half of Broadway from the west curb to the west rail of the car tracks. (Tr. 8.) The defendant constructed a barricade across the west side of Broadway up to the west rail

of the street car tracks. The street car tracks were open for traffic. (Tr. 8 and 9.) Only the west side was under construction leaving the east side open for traffic. (Tr. 8-13.)

The petitioners were passengers in a bus early in the morning of July 1, 1941. The bus was traveling south on Broadway and approached the barrier at 23rd Avenue. The driver of the bus turned left to get around the barrier to proceed south on the street car tracks. (Tr. 8.) There was a trolley pole between the tracks and about 75 feet south of the barrier. (Tr. 10.) The driver of the bus turned left, passed around the barrier, drove southward in the middle of Broadway and ran into the Gary Railway Company's trolley pole 75 feet south of the barrier. (Tr. 12.)

In several places in the amended complaint the petitioners allege the respondent was negligent in failing to warn them that the trolley pole was unlighted, and not painted black and white as required by law. The principal allegation relied on by the petitioners as stating a claim, is the allegation that defendant failed to have a red light at the end of the barrier as required by an Indiana statute. Instead of the red light the amended complaint alleges the defendant had some bomb torches which consisted of a flickering, smoking, yellowish, open flame, which produced no red flame. (Tr. 9.)

It is not alleged or contended that defendant had any control over that part of the highway occupied by the Gary Railways Company. The allegations in the amended complaint show that respondent did not have control over the trolley poles, or that part of the street occupied by street car tracks. (See Tr. 8 and paragraphs VI, VII, XI, XII and XIII of amended complaint.)

III.

SUMMARY OF ARGUMENT.

A.

The Petition Does Not Comply With Rule 38.

Rule 38 (2) of this court sets forth what a petition for writ of certiorari should contain. It provides also that, "a supporting brief may be annexed to the petition or presented separately, but it must be direct and concise." Further this rule provides, "a failure to comply with these requirements will be sufficient reason for denying the petition."

B.

Plaintiffs' Complaint Does Not State a Cause of Action.

Under the law of Indiana there was no duty upon the respondent to warn of a negligent condition created by a stranger to this case, namely the Gary Railways Company, who had failed to maintain warning of its trolley pole on a part of the highway over which respondent had no control.

The defendant's only duty was to warn the plaintiffs of any dangerous conditions which had been created by it, and where the plaintiffs' injuries resulted from the collision of the bus in which they were riding with the trolley pole of the Gary Railways Company some distance away on premises for which defendant was nowise responsible, it was incumbent upon the plaintiffs to show that defendant's violation of the Indiana statute bore a causal relationship to the injuries sustained by them. The allegations of the complaint not only fail to do this but expressly neg-

ative the existence of any such relationship. Paragraph 20 of the complaint alleges: "That by reason of said pole being unpainted as aforesaid, unlighted, as aforesaid, and without any red lights or any warning devices on it whatsoever, as aforesaid, or without any warning signs or red lights warning him of danger ahead, as aforesaid, the driver of said bus was unable to see said pole or know of its presence or of the danger ahead in time to avoid hitting said pole."

Where a statute in Indiana required the respondent to maintain a red light upon its barrier at the traffic end of road resurfacing work being done for the highway department of the State of Indiana and the driver of a bus carrying petitioners, being warned of the barricade by other lights placed there by the respondent contractor, drove safely around it, there was no causal connection between the alleged violation and the damage resulting proximately from the negligence of the Gary Railways Company.

IV.

ARGUMENT.

A.

The Petition Does Not Comply With Rule 38.

Rule 38 (2) of this court sets forth what a petition for writ of certiorari should contain. It provides also that, "a supporting brief may be annexed to the petition or presented separately, but it must be direct and concise." Further this rule provides, "a failure to comply with these requirements will be sufficient reason for denying the petition."

The petitioners' petition and brief are one. It is impossible to tell which part constitutes the petition and which the brief. In fact, the entire pretended petition appears to be a brief and not a petition.

Petitioners have set out under "Statement of The Matter Involved", beginning on page 2 of their brief, matters in no way bearing on the question sought to be presented.

The violation of Rule 38 is flagrant. The petition should be denied because of the failure to comply with Rule 38. It should also be denied for lack of a meritorious question as hereinafter shown.

B.

The Plaintiffs' Complaint Does Not State a Cause of Action.

Under the statutes of Indiana it was the duty of the Gary Railways Company to maintain that portion of the highway occupied by it. (Section 36-2902 Burns 1933.)

It was the duty of the State Highway Department to pro-

vide a detour or run-around for traffic, while defendant was resurfacing the highway. (Section 36-142 Burns 1933.)

It is contended by petitioners that because the respondent did not have a red light on the end of the barrier, they were not warned of the unpainted and unlighted trolley pole maintained by the Gary Railways Company between its tracks 75 feet south of the barrier.

The respondent's position is that it was charged with the duty to protect the public from injury that might result from its action or lack thereof, regarding that part of the highway over which it had control. It was not charged with a duty to protect the public against the negligence of the Gary Railways Company.

The petitioner urges that since they alleged in their complaint that the failure to have a red light, required by law, at the end of the barrier, was the proximate cause of their injuries, the court could not determine as a matter of law, that such negligence could not be the proximate cause. Petitioners contend the question of proximate cause should be determined by the jury.

The petitioners contend, that having said that the failure to have a red light at the end of the barrier was a proximate cause, the court was bound to accept that allegation as presenting a jury question, notwithstanding other facts alleged clearly show it could not be a proximate cause.

The Court of Appeals held, that since under the law of Indiana there was no duty on the respondent to warn of the negligence of the Gary Railways in failing to properly maintain its pole on a part of the highway over which respondent had no control, the failure to maintain a red light at the end of its barrier, could not be a proximate cause of the plaintiffs' injuries.

Petitioners urge that it was negligence *per se* on the respondent's part when it failed to comply with the statute

requiring a red light at the end of the barrier. It is true that a violation of the statute is negligence *per se*. But it does not follow that the negligence is a proximate cause of petitioner's injuries. For example, it would be negligence *per se* in Indiana for a motorist to fail to have a red light at the rear of his automobile at night, but it would play no part in a head-on collision.

Petitioner's whose theme is that the court usurped the function of the jury. Generally the question of proximate cause is for the jury. But where it clearly appears, as it does from the amended complaint, that the negligence could not be a proximate cause it is then a question for the court.

The law in Indiana upon circumstances and facts almost identical with this case is stated in *Mahoney* v. *Sharp*, 86 Ind. App. 180 (page 184), 156 N. E. 566:

> "It is true that a contractor must protect the public against obstructions in the highway resulting from his work, but no duty aside from the statute can be imposed upon him to protect against obstructions placed by others."

In support of respondent's position we quote from *Prest-O-Lite Co.* v. *Skeel*, 182 Ind. 593, 601, 106 N. E. 365, as follows:

> "A violation of penal statutes constitutes negligence *per se*, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought. * * * The violation of a statute or ordinance raises no liability for an injury which another may have suffered, unless the injury was in some material degree the result of such violation."

In *Hayes Freight Lines* v. *Wilson*, ... Ind. ....., 77 N. E. (2d) 580, 585, the court said:

> "If there was no causal connection between the violation of the statute and the injuries sustained by the appellee, the violation of the statute could not be the

proximate cause of such injuries and the jury should not have been informed that they could consider the evidence of such violation for any purpose."

If every allegation of petitioner's amended complaint were proved on a trial before a jury, the court would be required to sustain a motion for directed verdict. This is so because the petitioners are seeking to charge respondent with a duty which the law says is not its duty.

The petitioners complain of being deprived of a jury trial. They complain of the arbitrary action of the Court of Appeals. Throughout petitioners' petition-brief, they infer a design from the inception of this litigation on the part of the Court of Appeals to deprive them of their day in court. They have had their days in court with studied consideration of their rights under the law as applied to the facts, which they intend to prove as stated in their complaint. Justice is not only had through consideration of facts by a jury but also by application of law to the admitted facts as pleaded.

Petitioners ignore the rights of respondent. Should respondent be put to the expense and trouble of a useless trial, a trial that can only proceed as far as the plaintiffs' evidence when it would then terminate in defendant's favor?

If petitioners' position is correct no complaint however insufficient can be dismissed for failure to state a claim.

The amended complaint clearly and definitely shows, that the facts relied upon by petitioners, to establish liability on the respondent, falls short of stating a claim because it appears there was no duty on respondent under the law to warn petitioners of the unlighted and unpainted trolley pole of the Gary Railways Company. Moreover, it is entirely clear that a red light at the barrier could not have been any more effective than the bomb torches used by

respondent in warning petitioners of the existence of trolley pole located a considerable distance below the barrier and on a portion of the road not under repair. Manifestly, there can be no causal relationship between respondent's failure to use a red light instead of the torches and the accident alleged in the complaint.

The Court of Appeals very properly sustained the District Court.

WHEREFORE, respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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EDMOND J. LEENEY,
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